U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: APR 0 9 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:
Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as an elementary special education teacher with At the time she filed the petition, the petitioner worked at Mitchellville, Maryland. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and statistics about the test performance of PGCPS students.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on April 19, 2012. In an accompanying statement, counsel stated that the petitioner seeks the waiver "based on her expertise in the said field as evidenced by her numerous awards and citations from various institutions here in the United States and the testimonials on her behalf from her esteemed peers, parents of her pupils and superiors in the United States public school system."

Regarding counsel's claims of "numerous awards and citations," the USCIS regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F) states that "evidence of recognition for achievements and significant

contributions to the industry or field by peers, governmental entities, or professional or business organizations" can form part of a claim of exceptional ability. Exceptional ability, in turn, does not guarantee the waiver, because the statute clearly subjects aliens of exceptional ability to the job offer requirement. Therefore, the very existence of "awards and citations" does not necessarily imply eligibility for the waiver. It falls to the petitioner to show that she has received recognition of a caliber that goes beyond the sort that meets the lower threshold of exceptional ability. The evidence submitted does not meet the higher standard required for the national interest waiver.

Counsel's list of "Awards and Recognitions" included only one document that could plausibly be called an "award." Specifically, the [redacted] in Manila presented the petitioner with a "Certificate of Recognition . . . As Outstanding Teacher of [redacted] [for] School Year 2005-2006." Other certificates expressed appreciation for speeches or presentations that the petitioner gave to various groups, and many certificates simply acknowledged that the petitioner had held various titles. Universities in Manila recognized the petitioner's involvement in training individual student teachers, and [redacted] gave the petitioner several certificates "For Completion of Professional Performance" and "For Being A Valued Staff Member."

In a personal statement, the petitioner stated that her "strong ability to manage a classroom of students with multiple disabilities was honed by the 19 years of progressive experience in the field of special education." The petitioner described her dedication to teaching, but neither she nor counsel explained why the petitioner should qualify for the national interest waiver, which is an extra benefit over and above the basic immigrant classification that she seeks.

The petitioner submitted letters from teachers, administrators, and parents of students at [redacted] and schools in the Philippines where the petitioner had worked, praising her abilities and dedication. [redacted] school counselor at [redacted] described the challenges that the petitioner faces: "All of the students here are profoundly intellectually disabled. . . . [M]ost of the students are non-verbal; 40% of them cannot walk without mechanical assistance; 50% of them are autistic and all have behaviors that reflect the frustration and anger that accompanies their inability to communicate and lack of control over their environment." [redacted] asserted that many teachers have not lasted long in such conditions. Such letters indicate that the petitioner and her students must each confront daunting obstacles. Nevertheless, the standard for the waiver is that it must serve the national interest. Congress, when deciding on the parameters of the exemption from the job offer requirement, did not indicate that the difficulties of performing a given task, or of filling a position to perform that task, were valid grounds for waiving that requirement. Congress could have created a blanket waiver for special education teachers, but did not do so. Instead, the job offer requirement applies to members of the professions (such as special education teachers) and to aliens of exceptional ability (*i.e.*, foreign national workers who show a degree of expertise significantly above that ordinarily encountered in a given field). The witnesses, however sincere their praise of the petitioner's skills, did not demonstrate that the petitioner's work has had a significant impact or influence outside of that one school. They did not address the *NYSDOT* guidelines which, as published precedent, are binding on all USCIS employees. *See* 8 C.F.R. § 103.3(c). That decision cited elementary school teachers as an example of a profession in a field with overall national

importance (education), but in which individual workers generally do not produce benefits that are national in scope. *Id.* at 217 n.3.

The director issued a request for evidence on July 3, 2012, instructing the petitioner to submit documentary evidence to establish the "national-level benefits" of her work, as well as its "importance and influence." In response, counsel stated:

> Since a 'National Special Education Teacher' is not even a real concept but more of metaphysical cognition [*sic*], undersigned wishes to once again posit a realistic proposition upon which to establish that the self-petitioner's contributions will impart national-level benefits.
>
> Even authors of books, treatises and other academic materials on Special Education are not in any standing [*sic*] to claim that their contributions are national in scope since not all special education teachers can be said to utilize their works.

The director did not state that the petitioner had to show that she is "a 'National Special Education Teacher,'" or that "all special education teachers . . . utilize [her] works." National scope is not the same as universal reliance on the petitioner's work.

Counsel stated: "it is but harmless to assert that if an NIW Petition is made with premise on some prevailing Acts of United States Congress, that by itself renders the proposed employment national in scope." This assertion may be "harmless," but it is not persuasive. All employment-based immigrant classifications are based on "prevailing Acts of United States Congress," and so is the statutory job offer requirement. There is no rational basis to conclude that Congress, by mentioning a given occupation in a particular piece of legislation, exempted aliens in that occupation from the job offer requirement.

Counsel quoted remarks made by then-President George H.W. Bush when he signed the Immigration Act of 1990, which created the national interest waiver: "This bill provides for vital increases for entry on the basis of skills, infusing the ranks of our scientists and engineers and educators with new blood and new ideas." Counsel interpreted this passage to mean that Congress created the national interest waiver for educators. The Immigration Act of 1990, however, was not restricted to the creation of the waiver. It was, rather, an overhaul of the entire immigration structure, creating new employment-based immigrant classifications to replace the former "third preference" and "sixth preference" classifications previously in place. "[S]cientists and engineers and educators" are all members of the professions who, under the terms dictated by Congress in the Immigration Act of 1990 (as it amended the Act), are all subject to the job offer requirement.

Counsel mentioned other legislation and court cases, all of which affirmed the importance of education but none of which exempted teachers from the job offer requirement at section 203(b)(2)(A) of the Act. Counsel asserted: "With the above federal initiatives, it is manifest that the United States Government actually dictates the proposed employment to be national in scope." In

this way, counsel conflates the national importance of "education" as a concept, or "educators" as a class, with the impact of one teacher.

Counsel stated: "today's United States workers or Special Education Teachers are not as competitive as the foreign teachers who are already in the country since not all of them were educated by 'Highly Qualified Teachers.'" This assertion relies on the presumption that "foreign teachers who are already in the country . . . were educated by 'Highly Qualified Teachers.'" Counsel cited no evidence to support that claim, and the unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel contends that labor certification "would not meet the objective of the employer to hire highly qualified teachers pursuant to No Child Left Behind (NCLB) Law," because the Department of Labor would "most likely" not permit [redacted] to "require a Master's degree plus over 15 years of experience." Counsel stated that the denial of that labor certification would "stall[] the nation's urgent need for 'Highly Qualified Teachers.'" These assertions rely on the assumption that a less experienced teacher, holding only a bachelor's degree, is not "highly qualified" under the No Child Left Behind Act (NCLBA). That very statute, however, undermines counsel's assumption.

Section 9101(23) of the NCLBA, 20 U.S.C. § 7801(23), defines the term "highly qualified" in reference to teachers. Sections 9101(23)(B) and (C) of the NCLBA require that a "highly qualified" teacher "holds at least a bachelor's degree." Section 9101(23)(B) of the NCLBA also refers to "highly qualified" teachers who are "new to the profession." Thus, neither the petitioner's master's degree nor her "over 15 years of experience" are required for "highly qualified" status under the NCLBA. Counsel has, therefore, provided no persuasive support for the claim that the labor certification process frustrates the NCLBA's mandate for schools to employ "highly qualified teachers."

Counsel cited a study showing that special education teachers "shift careers" and move to general education, and therefore "[t]he protection afforded for US workers enshrined in the labor certification process will not in any way be jeopardized by grant of waiver in favor of" the petitioner. The statutory standard is that the waiver will serve the national interest, and counsel's observation does not address that standard. Similarly, under the regulation at 8 C.F.R. § 103.3(c), *NYSDOT* is binding precedent on all USCIS employees, and counsel's attempts to set it aside and synthesize an alternative standard from unrelated statutes cannot succeed.

According to counsel's own statistics, the petitioner's credentials do not readily stand out. Specifically, counsel asserted that "59% [of] special educators in the nation [hold] a Master's degree or equivalent," and "92% [of] special educators [have] full certification." These numbers indicate that nearly three out of five special educators in the United States possess professional credentials comparable to those of the petitioner. Nevertheless, counsel asserted that no two teachers are truly alike, owing to intangible factors that the labor certification process cannot take into account. Counsel then presumed that the petitioner is superior to United States workers in these unquantifiable areas. In effect, counsel declared the petitioner's superiority while also declaring that it would be impossible to measure this superiority.

Counsel stated that another [redacted] teacher received a national interest waiver, and asked that the present petition "be treated in the same light." While AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished service center decisions are not similarly binding. (In the case of a service center approval, there exists no written decision.) Furthermore, counsel has furnished no evidence to establish that the facts of the instant petition are similar to those in the unpublished decision. Without such evidence, the assertion that both cases merit the same outcome is unwarranted. The only stated similarity is that the beneficiary of the approved petition is "also a teacher in [redacted]." Even assuming that the service center correctly approved that petition, the approval does not, in any way, endorse or lend weight to the assertion that [redacted] teachers are collectively entitled to a blanket waiver of the job offer/labor certification requirement.

The petitioner submitted copies or photographs of additional certificates and awards, some received after the petition's filing date. The petitioner received an April 16, 2012 certificate from [redacted] "for [redacted]." The wording is ambiguous; it is not clear whether the committee nominated the petitioner, or whether the award certificate recognized the petitioner's own service on that committee. [redacted] also presented the petitioner with two plaques "for outstanding contributions" in June 2012.

The petitioner also submitted copies of certificates, photographs, and other materials that document the petitioner's career in minute detail, but do not address the *NYSDOT* guidelines.

In a new statement, the petitioner observed that [redacted] "is debarred for two years and unable to sponsor us at this time." The Department of Labor invoked the debarment provisions of section 212(n)(2)(C)(i) of the Act against [redacted] owing to certain immigration violations by that employer. As a result, between March 16, 2012 and March 15, 2014, USCIS cannot approve any employment-based immigrant or nonimmigrant petitions filed by [redacted][1] This debarment means that [redacted] is, temporarily, unable to file its own petition on the alien's behalf, and thus explains why labor certification is not an option in the short term. The inapplicability or unavailability of a labor certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that the alien will serve the national interest to a substantially greater degree than do others in the same field. *NYSDOT*, 22 I&N Dec. at 218 n.5. Neither the Texas Service Center nor the AAO is responsible for the debarment, and those entities have no authority to override or modify it. When the Department of Labor has penalized a given employer for abuse of the immigration process, it is not self-evidently in the national interest to circumvent that penalty by granting immigration benefits directly to prospective foreign employees, without the safeguards built into the job offer/labor certification process. Any waiver must rest on the petitioner's individual qualifications, rather than on the circumstances that (temporarily) prevent [redacted] from filing a petition on her behalf.

[1] The list of debarred employers is available online at http://www.dol.gov/whd/immigration/H1BDebarment.htm (copy added to record March 28, 2013).

Because the petitioner has not shown that her classroom activities produce national benefits or otherwise satisfy the *NYSDOT* guidelines, the petitioner must establish eligibility by other means. In her September 2012 statement, the petitioner asserted that she is "working on a book entitled [redacted] that could help the special education teachers across the country understand how to adapt curriculum for the same kind of student population or other disabilities." Publication and dissemination of such a work has the potential for national benefit, as other teachers can use the methods outlined in the book. The petitioner, however, had not shown that she has previously published similar works that have widely improved teaching methods. It would be premature to grant immigration benefits based on an unfinished book. One can only speculate as to how many teachers would read the book and successfully implement the new methods spelled out therein. The petitioner must demonstrate specific prior achievements which establish the alien's ability to benefit the national interest. *NYSDOT*, 22 I&N Dec. 219 n.6. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request. 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition prematurely, based on the expectation of future qualifying events. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In this instance, the petitioner did not mention the book at all in her initial submission of April 2012; several months later, the book was clearly unfinished.

[redacted] principal of [redacted] stated that the petitioner "has . . . become part of a nationwide network of distinguished providers through '*Connections Beyond Sight and Sounds*' with skills that demonstrate the effectiveness of specific interventions" for "students with deaf-blindness disabilities" (emphasis in original). [redacted] technical assistance specialist with Connections Beyond Sight and Sound at the [redacted] provided more information about the program and the petitioner's involvement with it:

> Connections is the Maryland Project on deaf-blindness. . . . Each state and territory in the U.S. has a deaf-blind project. Together we further knowledge in the educational field of deaf-blindness relative to best practice and research-based interventions for children with dual sensory impairment.
>
> . . . [The petitioner] has participated in a number of multi-state collaborative training initiatives through Connections. These trainings are for the purpose of education and dissemination of evidence-based interventions for children with the most significant disabilities.

[redacted] did not state that the petitioner participated in developing these interventions. Rather, "[s]he visited our regional demonstration classroom at the Maryland School for the Blind" and "replicated the model from MSB" "in her classroom." This information, therefore, indicates not that the petitioner is part of any coordinated national network, but rather that she received local training through a federally funded program that has parallels in other states.

The director denied the petition on December 12, 2012. The director quoted several witness letters and acknowledged submission of "[t]he petitioner's academic credentials, evaluations, awards and

recognitions," but found that the evidence did not show "how the benefits of her employment will be national in scope." The director stated: "The petitioner has not established that Congress intended the national interest waiver to serve as a blanket waiver for all teachers," and stated various points articulated in *NYSDOT*.

On appeal, counsel notes that Congress passed the NCLBA three years after the issuance of NYSDOT as a precedent decision, and claims that "the United States Congress, with the enactment of the **NCLB Act, has preempted the USCIS** with respect to the parameters that should guide its determination" regarding the waiver claim. Counsel, however, identifies no special legislative or regulatory provisions that exempt school teachers from *NYSDOT* or reduce its impact on them.

The assertion that the NCLBA modified or superseded *NYSDOT* is not persuasive; that legislation did not amend section 203(b)(2) of the Act. In contrast, section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub.L. 106-95 (November 12, 1999), specifically amended the Immigration and Nationality Act by adding section 203(b)(2)(B)(ii) to create special waiver provisions for certain physicians. Because Congress not only can amend the Act to clarify the waiver provisions, but has in fact done so in direct response to *NYSDOT*, counsel has not made a persuasive claim that the NCLBA indirectly implies a similar legislative change.

Counsel states that the petitioner "has submitted legal, testimonial as well as documentary evidence including logical and practical reasoning that establish the benefit derived by the United States from her employment is national in scope." Counsel emphasizes the "national priority goal of closing the achievement gap," but cites no evidence to show that the petitioner has produced nationally significant results in this regard. Instead, counsel repeats the assertion that, as a "highly qualified teacher," the petitioner's work is consistent with the stated goal.

Counsel asserts that there remains a pressing need for educational reform, and quotes a study that concluded the Teach For America program "rarely had a positive impact on reading achievement." In the same brief, counsel cites statistics regarding the Maryland School Assessment tests, indicating that [redacted] ranked near the bottom" in 2012 and "did not meet its Reading proficiency AMO targets." By 2012, the petitioner had been teaching in [redacted] for several years. The district's continued low ranking suggests that, even at the local level, the petitioner's efforts have not resulted in measurable overall improvements. Counsel does not explain how the petitioner's future work will "clos[e] the achievement gap" when there is no evidence that her past work has done so to any significant extent. Counsel then states that "Maryland's headway means that the United States, as a whole, is gaining inroads in achieving the NCLB Act goal of closing the achievement gaps in Reading, Science and Math proficiency for all American school children with special needs." The statistics provided by counsel indicate that Maryland's progress at the state level has largely been in spite, rather than because, of [redacted] performance.

Counsel claims that the petitioner "is an effective teacher in raising student achievement in STEM" (science, technology, engineering and mathematics), but, in the brief, cites no evidence in support of this assertion. Likewise, counsel asserts, without elaboration, that the petitioner "has demonstrated that she has a past history of achievement with some degree of influence on the field of special

education as a whole." Without evidence of specific, identified instances of that influence, this claim is empty.

Counsel contends that factors such as "the 'Privacy Act' protecting private individuals" make it "impossible" to compare the petitioner with other qualified workers. This assertion is tenuous for a number of reasons, not least of which is counsel's attempt, elsewhere in this proceeding, to compare the petitioner to other qualified workers by declaring her to be so superior that to replace her would be a disservice to her students. Counsel's contention rests on the false assumption that the *NYSDOT* guidelines amount to little more than an item-by-item comparison of an alien's credentials with those of qualified United States workers. The key provision, however, is that the petitioner must establish a record of influence on the field as a whole. To do so does not require a review of other teachers' credentials.

Counsel contends that, under the No Child Left Behind Act, schools that fail to meet specified benchmarks will lose federal funding and be "abolished," thereby putting the teachers out of work, and therefore United States teachers have an incentive to waive the labor certification requirement for highly qualified teachers. Counsel offers no real-life example of this situation ever happening.

The bulk of the appellate brief consists of complaints about labor certification and *NYSDOT* and general statements about educational reform. It is within Congress's power to establish a blanket waiver for teachers, "highly qualified" or otherwise, but contrary to counsel's assertions, that waiver does not yet exist.

As is clear from a plain reading of the statute, engaging in a profession (such as teaching) does not presumptively exempt such professionals from the requirement of a job offer based on national interest. Congress has not established any blanket waiver for teachers. Eligibility for the waiver rests not on the basis of the overall importance of a given profession, but rather on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.